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EXHIBIT 1
2/19/07
HB 645

TESTIMONY OF DEBORAH SMITH
ON BEHALF OF THE AMERICAN CIVIL LIBERTIES UNION OF MONTANA

HB 645, HEARING, HOUSE JUDICIARY COMMITTEE, FEBRUARY 19, 2007

HB 645 mandates testing of certain newborns for exposure to dangerous drugs or alcohol before birth, and if such tests reveal the presence of dangerous drugs or alcohol, the bill grants a civil cause of action to the newborn into adulthood for damages, and creates a new criminal offense against the birth parents for criminal endangerment. The bill also establishes a funding program to be administered by DPHHS on a child's behalf whose birth parent/s has/have been convicted of the new offense and paid criminal fines into the new fund. The American Civil Liberties Union of Montana opposes HB 645 for many reasons, ranging from its imprecise specifics to its unfounded biases, invasive procedures, and potential harm to mothers and their children. Instead of offering a workable solution for the very real and serious problems of drug and alcohol abuse by pregnant women, or by family members or domestic partners of pregnant women, HB 645 contributes to Montana's already out of control prison-population growth and expense.

The specifics of Section 1 are unworkable; they may be void for vagueness; and they are bad policy:

- In Section 1 (page 1, lines 13 - 16) the following terms are not defined: health care provider, appropriate officials, newborn, symptoms, and probable cause.
- In Section 1 (page 1, lines 28 - 29) the term "interested person" is defined in an arbitrary, imprecise, and illogical manner. What are "services to the newborn"? What if the birth father is not the birth mother's spouse? Why are only blood relatives included? What about adoptive families or step-families? Why should any third cousin twice-removed have a mandatory reporting duty imposed on him or her, but not a stepparent of the birth mother? Why is the birth mother herself not included -- what if her husband, partner, or parent is a drug user and she is not, and she wants to know if her baby is affected by their drug use?
- * Does "health care provider" include every person in the delivery room no matter how little time he or she may have spent in the delivery room, or whether he or she had anything at all to do with the delivery of the baby? Who is included? Who is not included?
- Who are these appropriate officials one must locate to request them to seek a search warrant? How are lay people supposed to figure out how to fulfill this mandatory reporting of unspecified symptoms? Where do they go - the police station, the sheriff's office, the county attorney, child protective services, the FBI, the DEA, the clerk of court, the post office?
- How long is a newborn a "newborn" under this bill? How long is the mandatory reporting requirement in effect? What happens to people who fail to report, or who try but cannot locate an appropriate official willing to seek a search warrant? What if no official will seek a search warrant?
- What are the symptoms giving rise to probable cause that trigger the mandatory reporting requirement? What is probable cause? How are people supposed to figure this out?

A reasonable person cannot figure out what is required under HB 645 Section 1. If enacted, section 1 likely would be struck down for being unconstitutionally vague. But even if these unworkable standards were constitutional, they are horrible policy on many different fronts, from the mandatory reporting of symptoms that could lead to harassment of parents by feuding families and invasive procedures conducted on innocent babies, to the wildly biased list of interested people subject to the reporting requirement, and to the flawed notion that test results showing presence of alcohol or dangerous drugs in the infant necessarily were due to the birth mother's substance abuse. It is well-documented that not all babies born with exposure to alcohol or dangerous drugs suffer adverse health or developmental effects. And babies that do suffer from prenatal exposure to alcohol or dangerous drugs very likely are subjected to other things that can cause them at least as much, if not more, harm, such as tobacco exposure, poor nutrition, and poor maternal health, which are not targeted by HB 645.

Section 2 of the bill creates a civil cause of action against both birth parents by a child testing positive for exposure to dangerous drugs or alcohol. The statute of limitations does not begin running until the child turns 18 years old. Damages specifically include psychological and emotional distress, trauma, and attorney fees and costs. The birth father is subject to suit even if he had no knowledge that the mother was using drugs or alcohol during her pregnancy. And the birth mother could be sued, even if she was not a drug or alcohol user, but someone in her home exposed her to dangerous drugs during her pregnancy. Ordinarily, all damages must be proven by the plaintiff in a tort case; they are not declared by statute. Nor are attorney fee awards granted in tort cases. The statute of limitations in tort cases is 2 or 3 years, depending on the claim alleged. Under HB 645 the statute of limitations would not run out until the child was a 20- or 21-year-old adult. These provisions are excessively punitive and mirror no other civil cause of action in the Montana Code.

Sections 3, 4 and 5 of the bill create a new funding program and a criminal endangerment offense against both birth parents for using or having knowledge of the use of dangerous drugs or alcohol during pregnancy, if the test results under Section 1 are positive for dangerous drugs or alcohol. There are many problems with this offense. In the first place, knowledge of an activity such as drug or alcohol use does not mean that the non-using parent has the ability to control that use by the using-parent. Under no circumstances can ACLU think of a situation in which a non-using parent should be subject to a criminal offense for activity engaged in by another person. In the second place, Montana knows well that criminalizing the use of drugs and alcohol by pregnant women and new mothers will be expensive and ineffective. These women need treatment and support, not prisons. And in many or most situations, babies and children need their mothers, not foster care. The funding program established in Section 3 will take lots of time and resources for DPHHS to implement through rules and in practice.

In a world of limited resources, there are many better ways for the State to address the problem of drug and alcohol use during pregnancy than by turning health care providers and family members into pregnancy police and newborn patrols, or creating unnecessary civil causes of action by children against their parents, or sending moms and dads to prisons instead of helping them learn how to care for their children. ACLU of Montana urges the Committee to vote NO on HB 645.